U.S. Department of Labor

Office of Administrative Law Judges
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MAILED: 01/02/2001

IN THE MATTER OF:	*	
	*	
Ronald L. Kelly	*	
Claimant	*	
	*	
Against	*	Case No.: 1999-LHC-3075
	*	
	*	OWCP No.: 7-144735
Eagle Manpower, Inc.[1]	*	
Employer	*	
	*	
and	*	
	*	
Louisiana Workers' Compensation Corporation	*	
Carrier	*	

APPEARANCES:

Sue Esther Dulin, Esq.
For the Claimant

Ted Williams, Esq.
For the Employer/Carrier

BEFORE: **DAVID W. DI NARDI**
Administrative Law Judge

DECISION AND ORDER - AWARDING BENEFITS

This is a claim for worker's compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended (33 U.S.C. §901, **et seq.**), herein referred to as the "Act." The hearing was held on March 27, 2000 in Gulfport, Mississippi, at which time all parties were given the opportunity to present evidence and oral arguments. The following references will be

[1]Employer is now named EM&G, Incorporated. (TR 84)

used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administrative Law Judge, CX for a Claimant's exhibit and EX for an Employer's exhibit. This decision is being rendered after having given full consideration to the entire record.

Stipulations and Issues

The parties stipulate (JX 1), and I find:

1. The Act applies to this proceeding.

2. Claimant and the Employer were in an employee-employer relationship at the relevant times.

3. On June 12, 1997 Claimant suffered an injury in the course and scope of his maritime employment.

4. Claimant gave the Employer notice of the injury in a timely manner.

5. Claimant filed a timely claim for compensation and the Employer filed a notice of controversion on March 30, 1999.

6. The parties attended an informal conference on May 28, 1999.

7. The applicable average weekly wage is in dispute.

8. The Employer voluntarily and without an award has paid certain compensation for certain periods of time.

The unresolved issues in this proceeding are:

1. The nature and extent of Claimant's disability.

2. Claimant's average weekly wage.

3. Claimant's entitlement to interest and so-called penalties on any past due benefits.

4. Attorney Dulin's entitlement to an attorney's fee and reimbursement of litigation expenses.

Post-hearing evidence has been admitted as:

Exhibit No.	Item	Filing Date
CX 18	Attorney Dulin's letter advising that Claimant had no further evidence to offer	05/22/00
CX 19	Attorney Dulin's letter suggesting a briefing schedule	06/19/00
EX 9	Attorney Williams' letter suggesting a briefing schedule	06/19/00
EX 10	Attorney Williams' letter revising the suggested briefing schedule	06/19/00
CX 20	Claimant's brief	06/26/00
CX 21	Attorney Dulin's letter reminding Attorney Williams that briefs are to be filed simultaneously as this Court did not sanction reply briefs	06/27/00
EX 11	Attorney Williams' letter filing	07/14/00
EX 12	Employer's brief	07/14/00

The record was closed on July 14, 2000 as no further documents were filed.

Summary of the Evidence

Ronald L. Kelly ("Claimant" herein), forty-five (45) years of age, with an eighth grade formal education and a GED obtained thereafter, as well as an employment history of manual labor and as a disc jockey, including work as an electrician or joiner-carpenter at other shipyards, was unemployed from 1980-1983 and was underemployed from 1984-1987 and from 1990-1993, during which time he worked various "odd jobs" for which he was paid cash. In 1993 Claimant began working as a disc jockey at various local clubs, primarily on Friday and Saturday nights, as well as on occasional holidays, for which work he was paid in cash, Claimant testifying that he earned an average of $75.00 for each night he worked. (TR 34-40, 65-73)

In early May of 1997 Claimant filled out an application for work as an electrician for Eagle Manpower, Inc. ("Employer" herein). Claimant was interviewed in Mobile, Alabama (EX 7 at 34)

by a recruiter for the Employer, a firm which recruits, hires and provides workers for various employers. Claimant was hired and advised that he would be working as an electrician on the building of a casino/riverboat at Pierre Port, a city near Morgan City, Louisiana. Claimant who believed he would be working or Network Marine (CX 13) apparently was working for Armstrong Data Service (ADS) (Ex 8 at 16), a company hired to perform the electrical work on the riverboat. Claimant's wage records reflect that he worked for the Employer for four and one-half weeks from May 14 through June 20, 1997. (EX 8 at 9) I note that Claimant's employment application and other personal papers are dated June 18, 1997. (CX 10) I also note that Claimant's application lists only his prior work for Fisher Skylights in West Nyack, New York from June 1987 through March 1990, where he was paid $15.00 per hour and was laid-off for lack of work. (CX 10 at 2; TR 40-41, 45-46, 57-58, 60-63, 84-90, 98-103)

As Claimant was living in Mobile at the time of his hiring and as Morgan City was a considerable distance from his home, the Employer hired Claimant for $10.00 per hour and he was also paid a per diem of $8.00 per hour for up to 40 hours per week or $320.00 for the per diem portion thereof. Claimant testified that he actually began working on May 11, 1997, worked two (2) days that first week and then four (4) full weeks before he had to stop working. He worked the first shift, **i.e.**, from 7:00 a.m. to 5:30 p.m., with thirty (30) minutes off for lunch. He was expected to work seven (7) days each week and he could work whatever overtime he was offered. On June 12, 1997 Claimant was working on the riverboat as it was berthed upon navigable waters and, as it had been raining, he "slipped and fell down (a) metal scaffolding" (CX 1 at 1) on which he was working, his right knee striking a cross beam. As the injury occurred just prior to the end of his shift, he continued working. However, overnight his knee swelled and the pain worsened and he reported the injury to his immediate supervisor, Charles White. Claimant was taken by ambulance to Lakewood Medical Center in Morgan City; x-rays were taken and the radiologist's impression was a "normal right knee." (EX 3 at 8) Anti-inflammatories were prescribed and Claimant was told to stay off his feet for a few days. "use crutches" to ambulate and to see his own doctor if the symptoms persisted. (EX 3; TR 41-49, 73-74, 90-93, 104-111, 115-121)

As Claimant could not work, he returned to Mobile and on July 15, 1997 he went to the Singing River Hospital (SRH) for diagnostic tests upon referral from Dr. Charlton H. Barnes, an orthopedic surgeon whom Claimant first saw on June 18, 1997, at which time Claimant's knee was placed in a brace. The knee symptoms continued and Dr. Barnes recommended an MRI. (EX 1 at 9-10) That test, performed on July 15, 1997, was read by Dr. Neal Polchow as showing, **inter alia**, osteoarthritic degenerative changes of the right knee and a large joint effusion with an apparent Baker's cyst. (EX 4 at 7; TR 49-51)

Dr. Barnes saw Claimant on July 24, 1997, at which time the doctor diagnosed the symptoms as due to "internal derangement right knee" and he prescribed arthroscopic surgery and removal of the cyst. A copy of the doctor's report was sent to the Carrier; the Carrier approved the surgery (EX 1 at 6) and it took place on August 13, 1997 (EX 4 at 8) and Claimant began post-operative rehabilitation on September 16, 1997. (**Id.**) The physical therapy continued until October 29, 1997. (EX 4 at 13-23) The prescription for therapy was renewed on November 14, 1997 (EX 4 at 24) and it continued until December 2, 1997. (EX 4 at 25-35) Such therapy resumed and continued for various periods of time until May 12, 1998, at which time Dr. Barnes recommended a functional capacities evaluation (FCE) to determine Claimant's residual work capacity. (EX 4 at 53; EX 4 at 36-52, 54-64)

The Employer referred Claimant for a second opinion by its medical expert, Dr. Guy L. Rutledge, III, an orthopedic surgeon, and the doctor, who examined Claimant on May 12, 1998, gave his impression as "degenerative and post-traumatic arthritis right knee status post video arthroscopy 1997," "an injury superimposed on some preexistent degenerative change." (EX 2 at 2) The FCE took place on May 21, 1998, lasted four (4) hours and Rachel Blades, O.T., reported that the FCE was "valid," that the "FSD calculation indicates that Mr. Kelly has a 79% functional strength deficit, a significant deficit" and that his "impairment is having a significant impact on his functional ability." According to Ms. Blades, "the results indicate that Mr. Kelly is able to work at the Light Physical Demand Level for an 8 hour day, according to the Dictionary of Occupational Titles, U.S. Department of Labor." (EX 2 at 7-15)

As of June 5, 1998, Dr. Rutledge opined that Claimant "had a valid FCE that shows significant strength deficit and restrictions which (sic?) regard bending, stooping and climbing," that he will "have to be retrained within these limits," that his impairment could be reasonably rated at ten (10%) permanent partial disability of the right lower extremity and that Claimant was released to return to see the doctor "PRN" or as necessary. (EX 2 at 3)

As of February 4, 1998, Dr. Barnes opined that Claimant has "probably a mild to moderate arthritis so we will give him ten percent permanent partial disability to the right leg." (EX 1 at 2) As the knee symptoms persisted Dr. Barnes recommended additional arthroscopic surgery on February 12, 1998 (EX 1 at 33), continued the light duty work restrictions on March 13, 1998 (EX 1 at 34) against climbing, squatting or lifting anything over thirty (30) pounds. (EX 1 at 35; TR 50-51)

Claimant cannot return to work for the Employer because of those restrictions. He was very pleased with his work for the Employer, was led to believe the job would be permanent because he was told by Mr. Ledbetter that the work in Louisiana, expected to

last six months or so, would be followed by work in Key West or Vicksburg, Mississippi, on similar projects. Through the auspices of the Department of Labor he was retrained by the Job Corps for work as a truck driver. He completed the course, obtained his CDL (commercial driver's license), as well as his GED. However, he has been unable to find work as a truck driver because it is uncomfortable for him to sit too long in the cab of the truck. It is difficult for him to get into/out of the cab and prolonged standing also aggravates his right knee pain. He was also involved in motor vehicle accident on November 27, 1998 during which his chest came in contact with the steering wheel; he did not reinjure his knee, settled that accident for $1,300.00 plus the cash value of his vehicle as it was totaled in the accident. In June of 1998 he began working again as a disc jockey, Claimant admitting he worked only on Wednesday nights. He also admitted that he has not filed income tax returns for the last few years. (TR 42-44, 52-54, 63-65, 73-76; EX 7 at 16; EX 7 at 17)

On the basis of the totality of this record and having observed the demeanor and heard the testimony of credible witnesses, I make the following:

Findings of Fact and Conclusions of Law

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459 (1968), **reh. denied**, 391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978).

The Act provides a presumption that a claim comes within its provisions. **See** 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), **cert. denied**, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), **aff'd**, 620 F.2d 71 (5th Cir. 1980); **Hampton v. Bethlehem Steel Corp.**, 24 BRBS 141 (1990); **Anderson v. Todd Shipyards**, **supra**, at 21; **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the

requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "**prima facie**" case. The Supreme Court has held that "[a] **prima facie** 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." **United States Indus./Fed. Sheet Metal, Inc., v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor**, 455 U.S. 608, 615 102 S. Ct. 1318, 14 BRBS 631, 633 (CRT) (1982), **rev'g Riley v. U.S. Indus./Fed. Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." **Id.** The presumption, though, is applicable once claimant establishes that he has sustained an injury, **i.e.**, harm to his body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989); **Brown v. Pacific Dry Dock Industries**, 22 BRBS 284, 285 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326 (1981).

To establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. **Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984); **Kelaita**, **supra**. Once this **prima facie** case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. **Parsons Corp. of California v. Director, OWCP**, 619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301, 305 (1989); **Kier**, **supra**. Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. **Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981); **Holmes v. Universal Maritime Serv. Corp.**, 29 BRBS 18 (1995). In such cases, I must weigh all of the evidence relevant to the causation issue. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **Holmes, supra**; **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

In the case **sub judice**, Claimant alleges that the harm to his bodily frame, **i.e.**, his internal derangement of the right knee,

resulted from his June 12, 1997 injury while working as a maritime employee for the Employer. The Employer has introduced no evidence severing the connection between such harm and Claimant's maritime employment. Thus, Claimant has established a **prima facie** claim that such harm is a work-related injury, as shall now be discussed.

Injury

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. **See** 33 U.S.C. §902(2); **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1312 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. **Gardner v. Bath Iron Works Corporation**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385 (1st Cir. 1981); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Januszie wicz v. Sun Shipbuilding and Dry Dock Company**, 22 BRBS 376 (1989) (**Decision and Order on Remand**); **Johnson v. Ingalls Shipbuilding**, 22 BRBS 160 (1989); **Madrid v. Coast Marine Construction**, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping v. Nash**, 782 F.2d 513 (5th Cir. 1986); **Independent Stevedore Co. v. O'Leary**, 357 F.2d 812 (9th Cir. 1966); **Kooley v. Marine Industries Northwest**, 22 BRBS 142 (1989); **Mijangos v. Avondale Shipyards, Inc.**, 19 BRBS 15 (1986); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mijangos**, **supra**; **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990); **Care v. WMATA**, 21 BRBS 248 (1988).

This closed record conclusively establishes, and I so find and conclude, that Claimant injured his right knee in his maritime accident on June 12, 1997, that the Employer had timely notice thereof, has authorized certain medical care and treatment and has paid certain compensation benefits from June 12, 1997 through December 28, 1998, a total 75.51428 weeks, for a total of

$20,137.14 (EX 7 at 19), and that Claimant timely filed for benefits once a dispute arose between the parties. In fact, the principal issue is the nature and extent of Claimant's disability, an issue I shall now resolve.

Nature and Extent of Disability

It is axiomatic that disability under the Act is an economic concept based upon a medical foundation. **Quick v. Martin**, 397 F.2d 644 (D.C. Cir. 1968); **Owens v. Traynor**, 274 F. Supp. 770 (D.Md. 1967), **aff'd**, 396 F.2d 783 (4th Cir. 1968), **cert. denied**, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. **Nardella v. Campbell Machine, Inc.**, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the injury. **American Mutual Insurance Company of Boston v. Jones**, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. (**Id**. at 1266)

Claimant has the burden of proving the nature and extent of his disability without the benefit of the Section 20 presumption. **Carroll v. Hanover Bridge Marina**, 17 BRBS 176 (1985); **Hunigman v. Sun Shipbuilding & Dry Dock Co.**, 8 BRBS 141 (1978). However, once claimant has established that he is unable to return to his former employment because of a work-related injury or occupational disease, the burden shifts to the employer to demonstrate the availability of suitable alternate employment or realistic job opportunities which claimant is capable of performing and which he could secure if he diligently tried. **New Orleans (Gulfwide) Stevedores v. Turner**, 661 F.2d 1031 (5th Cir. 1981); **Air America v. Director**, 597 F.2d 773 (1st Cir. 1979); **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Preziosi v. Controlled Industries**, 22 BRBS 468, 471 (1989); **Elliott v. C & P Telephone Co.**, 16 BRBS 89 (1984). While Claimant generally need not show that he has tried to obtain employment, **Shell v. Teledyne Movible Offshore, Inc.**, 14 BRBS 585 (1981), he bears the burden of demonstrating his willingness to work, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), once suitable alternate employment is shown. **Wilson v. Dravo Corporation**, 22 BRBS 463, 466 (1989); **Royce v. Elrich Construction Company**, 17 BRBS 156 (1985).

Section 8(a) and (b) and Total Disability

A worker entitled to permanent partial disability for an injury arising under the schedule may be entitled to greater compensation under Sections 8(a) and (b) by a showing that he/she is totally disabled. **Potomac Electric Power Co. v. Director**, 449

U.S. 268 (1980) (herein "Pepco"). **Pepco**, 449 U.S. at 277 n.17; **Davenport v. Daytona Marine and Boat Works**, 16 BRBS 1969, 199 (1984). However, unless the worker is totally disabled, he is limited to the compensation provided by the appropriate schedule provision. **Winston v. Ingalls Shipbuilding, Inc.**, 16 BRBS 168, 172 (1984). **See also Pool Company, Signal Mutual Indemnity Association, Ltd. v. Director, OWCP (White)**, 206 F.3d 543, 34 BRBS 19 (CRT)(5th Cir. 2000).

On the basis of the totality of this closed record, I find and conclude that Claimant has established that he cannot return to work as an electrician. The burden thus rests upon the Employer to demonstrate the existence of suitable alternate employment in the area. If the Employer does not carry this burden, Claimant is entitled to a finding of total disability. **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976). **Southern v. Farmers Export Company**, 17 BRBS 64 (1985). In the case at bar, the Employer did submit any evidence as to the availability of suitable alternate employment. **See Pilkington v. Sun Shipbuilding and Dry Dock Company**, 9 BRBS 473 (1978), **aff'd on reconsideration after remand**, 14 BRBS 119 (1981). **See also Bumble Bee Seafoods v. Director, OWCP**, 629 F.2d 1327 (9th Cir. 1980). I therefore find Claimant has a total disability until the date of his maximum medical improvement and/or the date of the Employer's Labor Market Survey, whichever events occurs first.

Claimant's injury has become permanent. A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. **General Dynamics Corporation v. Benefits Review Board**, 565 F.2d 208 (2d Cir. 1977); **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968), **cert. denied**, 394 U.S. 976 (1969); **Seidel v. General Dynamics Corp.**, 22 BRBS 403, 407 (1989); **Stevens v. Lockheed Shipbuilding Co.**, 22 BRBS 155, 157 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56 (1985); **Mason v. Bender Welding & Machine Co.**, 16 BRBS 307, 309 (1984). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of "maximum medical improvement." The determination of when maximum medical improvement is reached so that claimant's disability may be said to be permanent is primarily a question of fact based on medical evidence. **Lozada v. Director, OWCP**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Care v. Washington Metropolitan Area Transit Authority**, 21 BRBS 248 (1988); **Wayland v. Moore Dry Dock**, 21 BRBS 177 (1988); **Eckley v. Fibrex and Shipping Company**, 21 BRBS 120 (1988); **Williams v. General Dynamics Corp.**, 10 BRBS 915 (1979).

The Benefits Review Board has held that a determination that claimant's disability is temporary or permanent may not be based on a prognosis that claimant's condition may improve and become

stationary at some future time. **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979). The Board has also held that a disability need not be "eternal or everlasting" to be permanent and the possibility of a favorable change does not foreclose a finding of permanent disability. **Exxon Corporation v. White**, 617 F.2d 292 (5th Cir. 1980), **aff'g** 9 BRBS 138 (1978). Such future changes may be considered in a Section 22 modification proceeding when and if they occur. **Fleetwood v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 282 (1984), **aff'd**, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985).

Permanent disability has been found where little hope exists of eventual recovery, **Air America, Inc. v. Director, OWCP**, 597 F.2d 773 (1st Cir. 1979), where claimant has already undergone a large number of treatments over a long period of time, **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979), even though there is the possibility of favorable change from recommended surgery, and where work within claimant's work restrictions is not available, **Bell v. Volpe/Head Construction Co.**, 11 BRBS 377 (1979), and on the basis of claimant's credible complaints of pain alone. **Eller and Co. v. Golden**, 620 F.2d 71 (5th Cir. 1980). Furthermore, there is no requirement in the Act that medical testimony be introduced, **Ballard v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 676 (1978); **Ruiz v. Universal Maritime Service Corp.**, 8 BRBS 451 (1978), or that claimant be bedridden to be totally disabled, **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968). Moreover, the burden of proof in a temporary total case is the same as in a permanent total case. **Bell**, **supra**. **See also Walker v. AAF Exchange Service**, 5 BRBS 500 (1977); **Swan v. George Hyman Construction Corp.**, 3 BRBS 490 (1976). There is no requirement that claimant undergo vocational rehabilitation testing prior to a finding of permanent total disability, **Mendez v. Bernuth Marine Shipping, Inc.**, 11 BRBS 21 (1979); **Perry v. Stan Flowers Company**, 8 BRBS 533 (1978), and an award of permanent total disability may be modified based on a change of condition. **Watson v. Gulf Stevedore Corp.**, **supra**.

An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement. **Lozada v. General Dynamics Corp.**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Sinclair v. United Food & Commercial Workers**, 13 BRBS 148 (1989); **Trask v. Lockheed Shipbuilding & Construction Co.**, 17 BRBS 56 (1985). A condition is permanent if claimant is no longer undergoing treatment with a view towards improving his condition, **Leech v. Service Engineering Co.**, 15 BRBS 18 (1982), or if his condition has stabilized. **Lusby v. Washington Metropolitan Area Transit Authority**, 13 BRBS 446 (1981).

On the basis of the totality of the record, I find and conclude that Claimant reached maximum medical improvement on June 5, 1998 and that he has been permanently and totally disabled from June 6, 1998, according to the well-reasoned opinion of Dr.

Rutledge (EX 2 at 3), and such disability continued until July 13, 1998, the date of the Labor Market Survey of Joe Walker. (EX 5)

With reference to Claimant's residual work capacity, an employer can establish suitable alternate employment by offering an injured employee a light duty job which is tailored to the employee's physical limitations, so long as the job is necessary and claimant is capable of performing such work. **Walker v. Sun Shipbuilding and Dry Dock Co.**, 19 BRBS 171 (1986); **Darden v. Newport News Shipbuilding and Dry Dock Co.**, 18 BRBS 224 (1986). Claimant must cooperate with the employer's re-employment efforts and if employer establishes the availability of suitable alternate job opportunities, the Administrative Law Judge must consider claimant's willingness to work. **Trans-State Dredging v. Benefits Review Board, U.S. Department of Labor and Tarner**, 731 F.2d 199 (4th Cir. 1984); **Roger's Terminal & Shipping Corp. v. Director, OWCP**, 784 F.2d 687 (5th Cir. 1986). An employee is not entitled to total disability benefits merely because he does not like or desire the alternate job. **Villasenor v. Marine Maintenance Industries, Inc.**, 17 BRBS 99, 102 (1985), **Decision and Order on Reconsideration**, 17 BRBS 160 (1985).

An award for permanent partial disability in a claim not covered by the schedule is based on the difference between claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. §908(c)(21)(h); **Richardson v. General Dynamics Corp.**, 23 BRBS (1990); **Cook v. Seattle Stevedoring Co.**, 21 BRBS 4, 6 (1988). If a claimant cannot return to his usual employment as a result of his injury but secures other employment, the wages which the new job would have paid at the time of claimant's injury are compared to the wages claimant was actually earning pre-injury to determine if claimant has suffered a loss of wage-earning capacity. **Cook**, **supra**. Subsections 8(c)(21) and 8(h) require that wages earned post-injury be adjusted to the wage levels which the job paid at time of injury. **See Walker v. Washington Metropolitan Area Transit Authority**, 793 F.2d 319, 18 BRBS 100 (CRT) (D.C. Cir. 1986); **Bethard v. Sun Shipbuilding & Dry Dock Co.**, 12 BRBS 691, 695 (1980).

It is now well-settled that the proper comparison for determining a loss of wage-earning capacity is between the wages claimant received in his usual employment pre-injury and the wages claimant's post-injury job paid **at the time of his injury**. **Richardson**, **supra**; **Cook**, **supra**.

The parties herein now have the benefit of a most significant opinion rendered by the First Circuit Court of Appeals in affirming a matter over which this Administrative Law Judge presided. In **White v. Bath Iron Works Corp.**, 812 F.2d 33 (1st Cir. 1987), Senior Circuit Court Judge Bailey Aldrich framed the issue as follows: "the question is how much claimant should be reimbursed for this loss (of wage-earning capacity), it being common ground that it

should be a fixed amount, not to vary from month to month to follow current discrepancies." **White**, **supra**, at 34.

Senior Circuit Judge Aldrich rejected outright the employer's argument that the Administrative Law Judge "must compare an employee's post-injury actual earnings to the average weekly wage of the employee's time of injury" as that thesis is not sanctioned by Section 8(h).

Thus, it is the law that the post-injury wages must first be adjusted for inflation and then compared to the employee's average weekly wage at the time of his injury. That is exactly what Section 8(h) provides in its literal language.

While there is no obligation on the part of the Employer to rehire Claimant and provide suitable alternative employment, **see**, **e.g.**, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), **rev'g and rem. on other grounds Tarner v. Trans-State Dredging**, 13 BRBS 53 (1980), the fact remains that had such work been made available to Claimant years ago, without a salary reduction, perhaps this claim might have been put to rest, especially after the Benefits Review Board has spoken herein and the First Circuit Court of Appeals, in **White**, **supra**.

The law in this area is very clear and if an employee is offered a job at his pre-injury wages as part of his employer's rehabilitation program, this Administrative Law Judge can find that there is no lost wage-earning capacity and that the employee therefore is not disabled. **Swain v. Bath Iron Works Corporation**, 17 BRBS 145, 147 (1985); **Darcell v. FMC Corporation, Marine and Rail Equipment Division**, 14 BRBS 294, 197 (1981). However, I am also cognizant of case law which holds that the employer need not rehire the employee, **New Orleans (Gulfwide) Stevedores, Inc. v. Turner**, 661 F.2d 1031, 1043 (5th Cir. 1981), and that the employer is not required to act as an employment agency. **Royce v. Elrich Construction Co.**, 17 BRBS 157 (1985).

As indicated above, the Respondents have offered a Labor Market Survey (EX 5) in an attempt to show the availability of work for Claimant as a glove stripper, a security gate guard, shuttle bus driver, as a customer service representative at Enterprise Rent-A-Car, as a hardware cashier and as a maintenance electrician on production line machines. I do accept the results of that excellent labor market survey. Respondents' vocational counselor contacted prospective employers and determined that those above-identified jobs are within Claimant's residual work capacity and the restrictions imposed by Claimant's doctor.

It is well-settled that Respondents must show the availability of actual, not theoretical, employment opportunities by identifying specific jobs available for Claimant in close proximity to the place of injury. **Royce v. Erich Construction Co.**, 17 BRBS 157

(1985). For the job opportunities to be realistic, the Respondents must establish their precise nature and terms, **Reich v. Tracor Marine, Inc.**, 16 BRBS 272 (1984), and the pay scales for the alternate jobs. **Moore v. Newport News Shipbuilding & Dry Dock Co.**, 7 BRBS 1024 (1978). While this Administrative Law Judge may rely on the testimony of a vocational counselor that specific job openings exist to establish the existence of suitable jobs, **Southern v. Farmers Export Co.**, 17 BRBS 64 (1985), employer's counsel must identify specific available jobs; labor market surveys are not enough. **Kimmel v. Sun Shipbuilding & Dry Dock Co.**, 14 BRBS 412 (1981).

The Labor Market Survey and the addendum (EX 5) can be relied upon by this Administrative Law Judge for the more basic reason that there is a complete information about the specific nature of the duties of the jobs identified by Mr. Walker.

Mr. Joe H. Walker, CRC, the Respondents' vocational rehabilitation counselor (JX 2), has testified many times before this Administrative Law Judge and again Mr. Walker credibly testified that there are numerous suitable alternate job opportunities for Claimant within his restrictions against squatting, kneeling or crawling, as well as against continuous or repetitive climbing (EX 5 at 3), that Claimant was working, as of June 30, 1998, as a disc jockey at "the City Limits," on Main Street in Moss Point, Mississippi, on Friday and Saturday evenings earning the net amount of $200.00 per night as an independent contractor, that Claimant was not interested in any of the jobs suggested by Mr. Walker as Claimant's current "employment activity apparently conflicts with other opportunities identified as suitable vocational employment" and as Claimant did not wish to terminate his employment as a disc jockey, work in which he earns in two evenings that which he earned after working five days and forty hours for the Employer. (TR 123-139)

As Mr. Walker testified credibly before me and as Claimant was less than candid as to his work as a disc jockey and as his past employment history has been spotty and sporadic and as he has not filed income tax returns for the last ten (10) years or so, I find and conclude that the Respondents have established the availability of suitable alternate employment within his restrictions and that Claimant, if properly motivated to return to gainful employment, can perform those jobs identified by the Respondents. Moreover, Claimant's own actions establish, as of June 30, 1998, a wage-earning capacity. Thus, he is subject to the so-called **Pepco** doctrine and as recently interpreted by the U.S. Court of Appeals for the Fifth Circuit in **Pool Company, supra**. Accordingly, Claimant is limited to the benefits for his ten (10%) permanent partial impairment of the right lower extremity and such benefits, pursuant to Section 8(c)(2) of the Act, shall begin on June 30, 1998.

In view of the foregoing, I accept the results of the Labor Market Survey because I find and conclude that those jobs constitute, as a matter of fact or law, **suitable** alternate employment or **realistic** job opportunities. In this regard, **see Armand v. American Marine Corporation**, 21 BRBS 305, 311, 312 (1988); **Horton v. General Dynamics Corp.**, 20 BRBS 99 (1987). **Armand** and **Horton** are significant pronouncements by the Board on this important issue.

Average Weekly Wage

For the purposes of Section 10 and the determination of the employee's average weekly wage with respect to a claim for compensation for death or disability due to an occupational disability, the time of injury is the date on which the employee or claimant becomes aware, or on the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability. **Todd Shipyards Corp. v. Black**, 717 F.2d 1280 (9th Cir. 1983); **Hoey v. General Dynamics Corporation**, 17 BRBS 229 (1985); **Pitts v. Bethlehem Steel Corp.**, 17 BRBS 17 (1985); **Yalowchuck v. General Dynamics Corp.**, 17 BRBS 13 (1985).

The Act provides three methods for computing claimant's average weekly wage. The first method, found in Section 10(a) of the Act, applies to an employee who shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during **substantially** the whole of the year immediately preceding his injury. **Mulcare v. E.C. Ernst, Inc.**, 18 BRBS 158 (1987). "Substantially the whole of the year" refers to the nature of Claimant's employment, **i.e.**, whether it is intermittent or permanent, **Eleazar v. General Dynamics Corporation**, 7 BRBS 75 (1977), and presupposes that he could have actually earned wages during all 260 days of that year, **O'Connor v. Jeffboat, Inc.**, 8 BRBS 290, 292 (1978), and that he was not prevented from so working by weather conditions or by the employer's varying daily needs. **Lozupone v. Stephano Lozupone and Sons**, 12 BRBS 148, 156 and 157 (1979). A substantial part of the year may be composed of work for two different employers where the skills used in the two jobs are highly comparable. **Hole v. Miami Shipyards Corp.**, 12 BRBS 38 (1980), **rev'd and remanded on other grounds**, 640 F.2d 769 (5th Cir. 1981). The Board has held that since Section 10(a) aims at a theoretical approximation of what a claimant could ideally have been expected to earn, time lost due to strikes, personal business, illness or other reasons is not deducted from the computation. **See O'Connor v. Jeffboat, Inc.**, 8 BRBS 290 (1978). **See also Brien v. Precision Valve/Bayley Marine**, 23 BRBS 207 (1990); **Klubnikin v. Crescent Wharf & Warehouse Co.**, 16 BRBS 183 (1984). Moreover, since average weekly wage includes vacation pay in lieu of vacation, it is apparent that time taken for vacation is considered as part of an employee's time of

employment. **See Waters v. Farmer's Export Co.**, 14 BRBS 102 (1981), **aff'd per curiam**, 710 F.2d 836 (5th Cir. 1983); **Duncan v. Washington Metropolitan Area Transit Authority**, 24 BRBS 133, 136 (1990); **Gilliam v. Addison Crane Co.**, 21 BRBS 91 (1987). The Board has held that 34.4 weeks' wages do constitute "substantially the whole of the year," **Duncan**, **supra**, but 33 weeks is not a substantial part of the previous year. **Lozupone**, **supra**. Claimant worked for the Employer only 4 ½ weeks prior to his injury. Therefore Section 10(a) is inapplicable.

The second method for computing average weekly wage, found in Section 10(b), cannot be applied because of the paucity of evidence as to the wages earned by a comparable employee. **Cf. Newpark Shipbuilding & Repair, Inc. v. Roundtree**, 698 F.2d 743 (5th Cir. 1983), **rev'g on other grounds** 13 BRBS 862 (1981), **rehearing granted en banc**, 706 F.2d 502 (5th Cir. 1983), **petition for review dismissed**, 723 F.2d 399 (5th Cir. 1984), **cert. denied**, 469 U.S. 818, 105 S.Ct. 88 (1984).

Whenever Sections 10(a) and (b) cannot "reasonably and fairly be applied," Section 10(c) is applied. **See National Steel & Shipbuilding Co. v. Bonner**, 600 F.2d 1288 (9th Cir. 1979); **Gilliam v. Addison Crane Company**, 22 BRBS 91, 93 (19987). The use of Section 10(c) is appropriate when Section 10(a) is inapplicable and the evidence is insufficient to apply Section 10(b). **See generally Turney v. Bethlehem Steel Corporation**, 17 BRBS 232, 237 (1985); **Cioffi v. Bethlehem Steel Corp.**, 15 BRBS 201 (1982); **Holmes v. Tampa Ship Repair and Dry Dock Co.**, 8 BRBS 455 (1978); **McDonough v. General Dynamics Corp.**, 8 BRBS 303 (1978). The primary concern when applying Section 10(c) is to determine a sum which "shall reasonably represent the . . . earning capacity of the injured employee." The Federal Courts and the Benefits Review Board have consistently held that Section 10(c) is the proper provision for calculating average weekly wage when the employee received an increase in salary shortly before his injury. **Hastings v. Earth Satellite Corp.**, 628 F.2d 85 (D.C. Cir. 1980), **cert. denied**, 449 U.S. 905 (1980); **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981). Section 10(c) is the appropriate provision where claimant was unable to work in the year prior to the compensable injury due to a non-work-related injury. **Klubnikin v. Crescent Wharf and Warehouse Company**, 16 BRBS 182 (1984). When a claimant rejects work opportunities and for this reason does not realize earnings as high as his earning capacity, the claimant's actual earnings should be used as his average annual earnings. **Cioffi v. Bethlehem Steel Corp.**, 15 BRBS 201 (1982); **Conatser v. Pittsburgh Testing Laboratory**, 9 BRBS 541 (1978). The 52 week divisor of Section 10(d) must be used where earnings' records for a full year are available. **Roundtree**, **supra**, 13 BRBS 862 (1981); **compare Brown v. General Dynamics Corporation**, 7 BRBS 561 (1978). **See also McCullough v. Marathon LeTourneau Company**, 22 BRBS 359, 367 (1989).

Claimant submits that I should include in his average weekly

wage the $320.00 per week that he received as per diem to cover his food and lodging. However, I cannot accept that thesis as the U.S. Court of Appeals for the Fifth Circuit has just reversed the Board's decision on which Claimant's thesis is based. In **Quinones v. H.B. Zachery, Inc.**, 32 BRBS 6 (1998), the Board had held that such perdiem was included in the average weekly wage as it is "readily identifiable," notwithstanding the pertinent provision added to the Act by the 1984 Amendment with reference to such untaxed fringe benefits. Thus, in **H.B. Zachery Company v. Quinones; Director, OWCP**, 206 F.3d 474, 34 BRBS 23 (CRT)(5th Cir. 2000), the Court held that such per diem is not included in the average weekly wage.

Accordingly, as Claimant was paid $10.00 per hour and as he worked a total of 179 hours from May 11, 1997 through June 12, 1997, I find and conclude that his average weekly wage, pursuant to Section 10(e) of the Act, can reasonably be set at $421.62 as he worked an average of 42.62 hours per week for that closed period of time and as he was paid $10.00 an hour. I note that I indicated from the bench that Claimant had established an average weekly wage of at least $400.00 per hour (TR 156-157) as the Employer had agreed, in pre-hearing discovery on February 1, 2000, to an average weekly wage of $400.00 (CX 15 at 24) and as the methodology initially used by the Employer and as suggested by the Claimant is not sanctioned by Section 10.

Interest

Although not specifically authorized in the Act, it has been accepted practice that interest at the rate of six (6) percent per annum is assessed on all past due compensation payments. **Avallone v. Todd Shipyards Corp.**, 10 BRBS 724 (1978). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. **Watkins v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 556 (1978), **aff'd in pertinent part** and **rev'd on other grounds sub nom. Newport News v. Director, OWCP**, 594 F.2d 986 (4th Cir. 1979); **Santos v. General Dynamics Corp.**, 22 BRBS 226 (1989); **Adams v. Newport News Shipbuilding**, 22 BRBS 78 (1989); **Smith v. Ingalls Shipbuilding**, 22 BRBS 26, 50 (1989); **Caudill v. Sea Tac Alaska Shipbuilding**, 22 BRBS 10 (1988); **Perry v. Carolina Shipping**, 20 BRBS 90 (1987); **Hoey v. General Dynamics Corp.**, 17 BRBS 229 (1985). The Board concluded that inflationary trends in our economy have rendered a fixed six percent rate no longer appropriate to further the purpose of making claimant whole, and held that ". . . the fixed six percent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." **Grant v. Portland Stevedoring Company**, 16 BRBS 267, 270 (1984), **modified on reconsideration**, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258

provided that the above provision would become effective October 1, 1982. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

Medical Expenses

An Employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. **Perez v. Sea-Land Services, Inc.**, 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. **Colburn v. General Dynamics Corp.**, 21 BRBS 219, 22 (1988); **Barbour v. Woodward & Lothrop, Inc.**, 16 BRBS 300 (1984). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. **Addison v. Ryan-Walsh Stevedoring Company**, 22 BRBS 32, 36 (1989); **Mayfield v. Atlantic & Gulf Stevedores**, 16 BRBS 228 (1984); **Dean v. Marine Terminals Corp.**, 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is well settled. **Bulone v. Universal Terminal and Stevedore Corp.**, 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injury as he will require periodic follow-up for problems. **Tough v. General Dynamics Corporation**, 22 BRBS 356 (1989); **Gilliam v. The Western Union Telegraph Co.**, 8 BRBS 278 (1978).

Section 14(e)

Failure to begin compensation payments or to file a notice of controversion within twenty-eight (28) days of knowledge of the injury or the date the employer should have been aware of a potential controversy or dispute renders the employer liable for an assessment equal to ten (10) percent of the overdue compensation. The first installment of compensation to which the Section 14(e) assessment may attach is that installment which becomes due on the fourteenth day after the employer gained knowledge of the injury or the potential dispute. **Universal Terminal and Stevedoring Corp. v. Parker**, 587 F.2d 608 (3d Cir. 1978); **Fairley v. Ingalls Shipbuilding**, 22 BRBS 184 (1989), **aff'd in pert. part** and **rev'd on other grounds sub nom. Ingalls Shipbuilding v. Director**, 898 F.2d 1088 (5th Cir. 1990), **rehearing en banc denied**, 904 F.2d 705 (June 1, 1990) **Krotsis v. General Dynamics Corp.**, 22 BRBS 128 (1989), **aff'd sub nom. Director, OWCP v. General Dynamics Corp.**, 900 F.2d 506, 23 BRBS 40, 51 (2d Cir. 1990); **Rucker v. Lawrence Mangum & Sons, Inc.**, 18 BRBS 76 (1987); **White v. Rock Creek Ginger Ale Co.**,

17 BRBS 75, 78 (1985); **Frisco v. Perini Corp.**, 14 BRBS 798 (1981). Liability for this additional compensation ceases on the date a notice of controversion is filed or on the date of the informal conference, whichever is earlier. **National Steel & Shipbuilding Co. v. U.S. Department of Labor**, 606 F.2d 875 (9th Cir. 1979); **National Steel & Shipbuilding Co. v. Bonner**, 600 F.2d 1288 (9th Cir. 1978); **Spencer v. Baker Agricultural Company**, 16 BRBS 205 (1984); **Reynolds v. Marine Stevedoring Corporation**, 11 BRBS 801 (1980).

The Benefits Review Board has held that an employer's liability under Section 14(e) is not excused because the employer believed that the claim came under a state compensation act. **Jones v. Newport News Shipbuilding and Dry Dock Co.**, 5 BRBS 323 (1977), **aff'd sub nom. Newport News Shipbuilding & Dry Dock Co. v. Graham**, 573 F.2d 167 (4th Cir. 1978), **cert. denied**, 439 U.S. 979 (1978).

The Benefits Review Board has held that "a notice of suspension or termination of payments which gives the reason(s) for such suspension of termination is the functional equivalent of a Notice of Controversion." **Hite v. Dresser-Guiberson Pumping**, 22 BRBS 87, 92 (1989); **White v. Rock Creek Ginger Ale Company**, 17 BRBS 75, 79 (1985); **Rose v. George A. Fuller Company**, 15 BRBS 194, 197 (1982) (Chief Judge Ramsey, concurring).

In the case at bar, the Respondents terminated Claimant benefits on July 28, 1998 and, on the Form LS-208, dated July 29, 1998, the Carrier advised the District Director that benefits were being terminated because "Claimant is working." (EX 7 at 23) However, as that form was not filed until sometime after July 29, 1998, Claimant is entitled to an award of additional compensation, pursuant to the provisions of Section 14(e) for the following reason. Although the Employer has accepted the claim, has provided the necessary medical care and treatment and has voluntarily paid certain compensation benefits from the day of the accident to the present time and continuing, the Employer has used an incorrect average weekly wage. Claimant is entitled to the mandatory assessment on the difference between his correct average weekly wage of $426.20 and the wage used by the Employer of $205.00, as of July 11, 1997 (EX 7 at 33), and as increased to $400.00 as of January 6, 1998 (EX 7 at 30) herein. **National Steel and Shipbuilding v. Bonner**, 600 F.2d 1288 (9th Cir. 1979); **Ramos v. Universal Dredging Corporation**, 15 BRBS 140, 145 (1982); **McNeil v. Prolerized New England Co.**, 11 BRBS 576 (1979); **Garner v. Olin Corp.**, 11 BRBS 502, 506 (1979). As the form LS-207 was not filed, the Section 14(e) mandatory assessment terminates on July 29, 1998, the date on the Form LS-208 (EX 7 at 23)

Attorney's Fee

Claimant's attorney, having successfully prosecuted this

matter, is entitled to a fee assessed against the Employer and Carrier ("Respondents" herein). Claimant's attorney shall file a fee application concerning services rendered and costs incurred in representing Claimant after May 28, 1999, the date of the informal conference. Services rendered prior to this date should be submitted to the District Director for his consideration. The fee petition shall be filed within thirty (30) days of receipt of this decision and Respondents' counsel shall have fourteen (14) days to comment thereon.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

It is therefore **ORDERED** that:

1. The Employer/Carrier ("Respondents") shall pay to the Claimant compensation for this temporary total disability from June 12, 1997 through June 5, 1998, based upon an average weekly wage of $426.20, such compensation to be computed in accordance with Section 8(b) of the Act.

2. Commencing on June 6, 1998, and continuing until June 29, 1998, the Respondents shall pay to the Claimant compensation benefits for his permanent total disability, based upon an average weekly wage of $426.20, such compensation to be computed in accordance with Section 8(a) of the Act.

3. The Respondents shall pay to Claimant compensation for his ten (10%) percent permanent partial disability of the right leg, based upon his average weekly wage of $426.20, such compensation to be computed in accordance with Section 8(c)(2) of the Act, commencing on June 30, 1998.

4. The Respondents shall receive credit for all amounts of compensation previously paid to the Claimant as a result of his June 12, 1997 injury.

5. Interest shall be paid by the Respondents on all accrued benefits at the T-bill rate applicable under 28 U.S.C. §1961 (1982), computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

6. The Respondents shall furnish such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related injury referenced herein may require, subject to the

provisions of Section 7 of the Act.

7. The Respondents shall pay to Claimant additional compensation at the rate of ten (10%) percent, pursuant to Section 14(e) of the Act, based upon the difference in the amount of weekly benefits Claimant should have received and the amounts voluntarily paid by Respondents for those installments due between June 12, 1997 and July 29, 1998.

8. Claimant's attorney shall file, within thirty (30) days of receipt of this Decision and Order, a fully supported and fully itemized fee petition, sending a copy thereof to Respondents' counsel who shall then have fourteen (14) days to comment thereon. This Court has jurisdiction over those services rendered and costs incurred after the informal conference on May 28, 1999.

DAVID W. DI NARDI
Administrative Law Judge

Dated:

Boston, Massachusetts
DWD:jl